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No. ..-...
IN THE

Supreme Court of the United States

October Term, 1982

LOUIS TOM DRAGNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Whether a conviction under 18 U.S.C. Section 1962(c) or (d) [RICO] can be based on predicate offenses of which a defendant has been acquitted or in which he was admittedly not involved.

2. Whether jury instructions are correct in a RICO conspiracy case which require the jury to find a conspiracy to commit the RICO predicate offenses, but not a conspiracy to commit a RICO substantive offense.

3. Whether the government must be bound by promises of immunity or confidentiality made by government investigators to a criminal suspect.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Louis Tom Dragna petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below.

The opinion of the Court of Appeals [Appendix A, *infra*] is not yet reported.

Jurisdiction.

The Judgment of the Court of Appeals was entered September 3, 1982. A timely petition for rehearing and suggestion for rehearing en banc was filed September 16, 1982. The petition for rehearing and suggestion for rehearing en banc were denied November 1, 1982. [Appendix B].

An application for stay of mandate was granted by order filed November 17, 1982. [Appendix C]. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Statutes and Rules Involved.

The relevant provisions of the Racketeering Influenced and Corrupt Organizations Act [RICO], Title 18, U.S.C. Sections 1962(c) and 1962(d) are set forth in Appendix D.

Statement.

1. The petitioner Louis Tom Dragna was charged as one of five defendants in a five count indictment. Counts I and II charged a RICO conspiracy and substantive offense, respectively, under Title 18, U.S.C. Sections 1962(d) and 1962(c). Count III charged a Hobbs Act extortion under Title 18, U.S.C. Section 1951. Count IV charged an additional Hobbs Act violation, with which the petitioner Dragna was not charged. Count V charged an obstruction of justice under Title 18, U.S.C. Section 1510, through the murder of Frank Bompensiero, an informant.

After a seven week trial, the petitioner was acquitted on Counts II and V, and convicted on the RICO offenses in Counts I and II.

The petitioner was sentenced to two years in custody and a fine of $25,000.00. He remains at liberty to this date on bail on appeal, pursuant to a stay of mandate issued by the Ninth Circuit.

2. In an opinion filed September 3, 1982, the court below affirmed the petitioner's conviction and rejected a wide variety of claims of error. A timely petition for rehearing was denied. The court did grant petitioner a stay of mandate to permit the filing of this petition.

REASONS FOR GRANTING THE PETITION.

1. The question presented in this case concerning the ability of the government to rely as predicates to a RICO charge on offenses of which the defendant has been acquitted is an important and recurring one which has divided the Circuits. The opinion of the court below relies on offenses for which the petitioner was acquitted in determining the sufficiency of the evidence, and thus, permits extraordinary and irrational jury verdicts in future RICO prosecutions. As a result, review by this court is appropriate.

The petitioner was charged, and ultimately convicted, of a RICO conspiracy [18 U.S.C. Section 1962(d)] and RICO substantive [18 U.S.C. Section 1962(c)] offense.

The RICO conspirary [Count I] charged as predicate offenses the activities alleged in Count III [of which petitioner and all co-defendants were acquitted], Count IV [with which petitioner was not charged], Count V [of which petitioner and all co-defendants were acquitted], and the extortion of one Ruben Sturman.

The RICO substantive offense [Count II] charged as predicate offenses the same activities as Count II and an extortion from Sam Farkas, in which the government conceded the petitioner was not involved.

The court below rejected petitioner's argument that the evidence was insufficient to convict him because there was no sufficient evidence of his involvement in two predicate offenses as required by 18 U.S.C. Section 1961(5). Slip Opinion p. 19. In so doing the court cited the doctrine of inconsistent verdicts and *specifically relied* on the allegations of Counts III, IV, and VI [of which petitioner was acquitted or with which he was not charged] and the Farkas extortion in which he was uninvolved.

Without specifically saying so, the court resolved the question left open by the Ninth Circuit in *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980).

The position taken by the Ninth Circuit in the opinion below conflicts with that apparently taken in the Third Circuit. In *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978) the Third Circuit reversed a RICO conviction after finding the evidence of two predicate offenses to be insufficient, although other predicate offenses existed for which the evidence was sufficient.[1] The decision in *Brown* necessarily implies that a trial jury and a court of appeal cannot rely on predicate offenses for which the defendant is acquitted to support a RICO conviction.[2]

The Second Circuit has taken internally inconsistent approaches to this question. In *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975) the court found that a RICO conviction could stand so long as the evidence were sufficient on any two charged predicate acts. Five years later, in *United States v. Huber*, 603 F.2d 387, 399 (2d Cir. 1979) the court retracted from that earlier statement.[3] In a

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[1]Brown thus applied the rule recognized by the Ninth Circuit in normal conspiracy cases, which requires the reversal of a conspiracy count if it is found that one of the objects of the conspiracy was not legally recognizable. See *United States v. Kaye*, No. 81-1524, decided November 22, 1982.

[2]See also *United States v. Dansker*, 537 F.2d 40, 52 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 92 S.Ct. 732, 50 L.Ed.2d 748 (1977); *United States v. Pray*, 452 F.Supp. 788, 801 (M.D.Pa. 1978).

[3]In discussing the applicability of *United States v. Brown, supra*, the court stated "We need not decide whether this Circuit would agree with that analysis, *cf., United States v. Parness, supra*, 503 F.2d at 438 ('convictions on any two of these [travel fraud] counts were sufficient under Section 1961(5) to establish the "pattern of racketeering activity" necessary for a conviction under Section 1962(b)') because the evidence was sufficient to sustain all the mail fraud counts submitted to the jury."

later decision, the court took a somewhat confusing approach in attempting to distinguish *Brown*. *United States v. Weisman*, 624 F.2d 1118, 1124-25 (2d Cir. 1980), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209 (1980).[4]

The confusion expressed by these cases is indicative of the need for clarification by this court of an issue which is central to the continued effectiveness of the RICO statute and the protection of the rights of criminal defendants charged with RICO.

2. The need for review by this court is heightened by a separate substantial error in the reasoning of the court below which interrelates with the problem discussed above, and which places the Ninth Circuit at odds with this court and most Circuit Courts of Appeals in its analysis of the fundamental elements of a RICO conspiracy charge.

The trial jury was instructed, in essence, that, with regard to the RICO conspiracy, it should determine whether a conspiracy existed to commit the *predicate offenses*.[5] The opin-

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[4]*Weisman* involved a conviction on two conspiracy charges and various substantive offenses, all of which were objects of the conspiracies. The conspiracy counts and the substantive offenses were all RICO predicates. After deciding that the conspiracy count could appropriately be considered as RICO predicates, the court concluded that even if it erred in that regard, the conviction on the remaining substantive counts were sufficient to support the RICO conviction. It distinguished *Brown* on the grounds that the substantive counts reversed in *Brown* were not part of the charged conspiracies.

[5]The initial instructions given the jury regarding Count I were standard conspiracy instructions given under Title 18, U.S.C. Section 371. An additional charge, objected to by the defense, was as follows: "With regard to Count I, ladies and gentlemen, it must be proved beyond a reasonable doubt that a defendant conspired to commit any two of the racketeering acts that comprise the pattern of racketeering activities set out in the indictment . . . . In addition it must be proved beyond a reasonable doubt that during the course of the charged conspiracy, first, that the defendant was employed by or associated with an enterprise quote unquote as defined in these instructions, second, that at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, and that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern and not merely a series of disconnected acts. That through the commission of two or more connected — third, that through the commission of two or more connected offenses, the defendant conducted or participated in the conduct of the enterprise."

ion below found that the instructions accurately described the elements of a Section 1962(d) offense. Slip Opinion pp. 24-27.[6] That decision is clearly incorrect and conflicts with decisions in other Circuits as well as previous decisions of the Ninth Circuit.[7]

The instructions of the trial court, as ratified by the opinion below, denied the petitioner his right to jury consideration of each element of the offense. In addition, the net effect of the instruction was to induce the otherwise contradictory verdicts between the RICO and predicate offenses. The jury apparently believed that the RICO charge could be proved by a *conspiracy* to commit the substantive offenses, although no substantive violations occurred. Under the instructions actually given, this result would have been appropriate.

3. The final, but by no means least significant, area requiring review by this court involves the admission into

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[6]The opinion below analyzed the instructions as follows: "The instructions given here required each defendant to agree to participate in two specific racketeering acts, even on Count I. The term 'enterprise' was defined and the jury told they must find that each defendant was employed by or associated with a racketeering enterprise, and that the racketeering offenses were connected by a common scheme, plan, or motive so as to constitute a pattern 'and not merely a series of disconnected acts.' They were also told they must find 'through the commission of two or more connected offenses the defendant conducted or participated in the conduct of the enterprise.' These instructions were adequate to inform the jury of the elements of a RICO conspiracy, and required them to find an overall conspiracy to conduct an enterprise through a pattern of racketeering. . . ." Nowhere, however, was there an instruction on the need to find an agreement to participate in the affairs of the enterprise.

[7]See for example, *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980); *United States v. Bright*, 630 F.2d 804, 822, n.34 (5th Cir. 1980); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978); and *United States v. Zemek*, 634 F.2d 1159, 1170, n.15 (9th Cir. 1980): "The essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering."

evidence of statements allegedly made by petitioner to agents of the FBI before the return of the indictment. The question presented involves the effect of promises of immunity or confidentiality upon statements obtained from criminal suspects, an issue which has provided contradictory results and found diverse solutions.

According to agents who testified at the petitioner's trial, petitioner had conversations with FBI agents from time to time between 1969 and 1976. During these conversations it was "understood" that if petitioner helped the FBI his cooperation would be kept "confidential."

In mid-October, 1976 the petitioner received a federal grand jury subpoena. That subpoena had been issued by the FBI as a plan to "cultivate" the petitioner as an informant. True to the FBI's expectations, petitioner sought assistance with the subpoena. A meeting between the petitioner and two agents was arranged. In the two and a half to three hour conversation that followed, petitioner purportedly admitted being the temporary boss of the Los Angeles family of the La Cosa Nostra, acknowledged the position of other persons within the organization, and admitted attending a meeting at which James Fratianno, later a government witness, asked for and received permission to "shake down pornographers."

The petitioner was told that if he cooperated any information he provided would not be used against him, but that any independent evidence of wrongdoing developed by the FBI could be used to prosecute him.

The agent later that day sent a teletype to Washington which spoke of Dragna's "cooperation" in that conversation.

In the face of an understanding of confidentiality, the government introduced these highly incriminating statements against Dragna.

The court below disposed of this argument in summary fashion with the somewhat cryptic remark that "statements made in confidence are not immune, absent an unconditional promise of confidentiality" [Slip Opinion p. 13], citing *Matter of Wellins*, 627 F.2d 969, 972 (9th Cir. 1980). It rejected the petitioner's contention that the grand jury subpoena was a "ruse designed to cultivate him as an informant", opining that no evidence was offered on this point, although the FBI agent testified that that was the purpose of the subpoena.

In any event, such promises of immunity or confidentiality have been honored by various federal courts, including the Ninth Circuit. Despite the citation by the court below to *United States v. Wellins*, the opinion below conflicts with *Wellins*. *Wellins*, in fact, recognized the binding natures of promises of confidentiality. See also *Matter of Doe*, 410 F.Supp. 1163 (E.D. Mich. 1976). Similar promises have been recognized by the Fifth Circuit [*United States v. Weiss*, 599 F.2d 730 (5th Cir. 1970)] and previously by the Ninth Circuit [*United States v. Garcia*, 519 F.2d 1343 (9th Cir. 1975)].

The "Dragna statements" were perhaps the most telling evidence against petitioner, whose alleged participation in the schemes under consideration was only proved by the most vague and circumstantial evidence. The need for clarification of the ability of government agents to induce such statements with promises of confidentiality or immunity, and to thereafter renege on that agreement requires immediate consideration by this court.

Conclusion.

The petition for writ of certiorari should be granted.

Dated: December 15, 1982.

Respectfully submitted,

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